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No. 1567

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

NEIL GALLAGHER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OCTOBER TERM, 1970

NO.

NEIL GALLAGHER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Assistant Justices of the Supreme Court:

Neil Gallagher, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Judgment and Opinion of the Court below.

On February 11, 1971 the Court of Appeals for the Seventh Circuit affirmed the judgment of conviction in the district court (Northern district of Illinois, Eastern division). On March 16, 1971 a timely petition for rehearing was denied. The opinion is not yet reported, but is appended hereto as Appendix A. The order denying rehearing is appended hereto as Appendix B.

Jurisdictional Statement.

The jurisdiction of this court is invoked under Title 28 U. S. Code, Sec. 1254 (1).

Questions Presented For Review.

1. Whether the petitioner's Sixth Amendment right to counsel was violated when his attorney stated and demonstrated that an impossible conflict of interests existed between the petitioner and his co-defendant, both of whom the attorney represented?

2. Whether the trial court should have held a hearing to determine if petitioner freely and voluntarily waived his right to be represented by counsel other than counsel for his co-defendant when the record demonstrated (a) that counsel repeatedly advised the court he was in "an untenable position" in representing both defendants because "I find myself in a hard position to cross-examine this witness as to both defendants", (b) that the attorney further announced to the court, at the close of the government's case, that the petitioner desired to take the stand, but that petitioner's co-defendant did not want him to do so, and (c) where defense counsel stated to the court, "I find myself in the position as a lawyer that I don't know what to do. These two gentlemen are at odds with each other as a result of everything last night"?

3. Whether the trial court had the obligation to protect petitioner's right to testify and defend himself in view of this court's holding in *Glasser* v. *United States,* 315 U.S. 60 at 70, stating, "The right to counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial"?

Sixth Amendment to the Constitution

In all criminal prosecutions, the accused shall have the assistance of counsel for his defense.

Statement of the Case.

Petitioner, Neil Gallagher, together with his brother, Thomas, was indicted on January 30, 1969 and charged in 7 substantive counts of using the telephone on 7 separate dates between July 7, 1967 and September 24, 1967 in furtherance of a scheme to defraud in violation of 18 U.S. Code Sec. 1323. Count 8 charged both Neil and Thomas with conspiracy to do the acts alleged in the first 7 substantive counts (A. 1).[1]

As described in the indictment, the scheme to defraud was perpetrated by the use of stolen or otherwise appropriated American Express cards to buy airline tickets which were then sold at a 50% discount (A. 1-2).

Thomas Gallagher was arraigned on February 14, 1969, his attorney being Philip H. Goodman (A. 2). Neil Gallagher's arraignment was continued from time to time to enable him to get a lawyer (A. 2) and finally, on April

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[1] "A" refers to printed Appendix of Record as filed in the Court of Appeals case No. 17937.

23, 1969, attorney Antonio M. Gassaway was appointed as counsel (A. 3). Attorney Goodman, who had attempted to withdraw as counsel for Thomas from March 13, 1969 on, filed his appearance for Neil for the sole purpose of arraignment only (A. 3).

Then attorney Gassaway moved for leave to withdraw as counsel for Neil on June 25, 1969, but the motion was denied (A. 5). On the same date attorney Harvey J. Powers was given leave to file his appearance as additional counsel for both Neil and Thomas (A. 5).

Trial commenced on September 8, 1969 and both attorneys Goodman and Gassaway were granted leave to withdraw from the case (A. 6). Attorney Harvey Powers remained as counsel for both defendants.

After the government presented its chief witness, Fred Foster, and before cross examination, attorney Powers advised the court as follows:

> "I find myself in, I think, an untenable position legally. The basis of what I am going to say now is a motion for mistrial . . . Now this is a conspiracy matter, your Honor. The evidence introduced by Mr. Todd on behalf of the Government from Mr. Foster was considerably more — the weight of the evidence leaned considerably more to Thomas Gallagher than it did to Neil Gallagher . . . The only problem I find at this juncture, your Honor, is very simply this: As far as this witness is concerned, to which I am going to address myself at the moment, before the jury, is the fact that I find myself in a hard position to cross-examine this witness as to both defendants. I don't know legally or morally whether I should let Tom Gallagher go at this time and concentrate on the lack of evidence against Neil Gallagher or whether I should concentrate on the [evidence] against Neil and pound that in front of the jury."

"The Court: I wish I could be a professor of criminal law and instruct you how to do it, but I am an impartial judge and all I can do—all I can tell you is that counsel has put in his case the way all conspiracy cases are put in . . ."

"Mr. Powers: . . . I indicated to the Court yesterday, that I thought perhaps during the hearing of the matter before your Honor and the jury that there was a potential conflict of interest between my clients and my representing both of them, and now I may have been a bit premature, but now in my very humble judgment, your Honor, the evidence would seem to support my position as far as my having the evidence from the last two witnesses . . ."

A motion for a mistrial was denied (A. 12-13).

The government closed its case on Thursday, September 11, 1969. Attorney Powers announced that both defendants likewise rested, without the production of any evidence (A. 25). At opening of court on Friday, September 12, 1969, the following occurred:

Mr. Powers: "I came to court this morning at about quarter to ten, and at that juncture I was met in the hallway by my client Neil Gallagher who informed me that last night after he and I had parted the latter part of the evening, that he was accosted and physically beaten by three parties. These parties are unknown to him at this time.

He further informed me that during the course of this beating certain remarks were made to him with regard to this matter, the matter being the case on trial before your Honor. Now I was not present, I can't say anything other than the fact that Neil Gallagher as a result of this transaction last night, this alleged transaction, has asked me to make a motion before the Court to reopen the defense and to allow him to take the witness stand in this matter. These

are the requests that have been made of me by my client Neil Gallagher.

On the other hand, I have a client Thomas Gallagher. Mr. Thomas Gallagher says that he knows nothing of this, he does not want the case reopened, he wants the case to continue on trial as it has up until the closing of court yesterday.

I, like any other lawyer, can only make judgments based upon my experience, your Honor, and my ability to think rationally. I have never had anything like this happen to me during the pendency of a trial either in the state court or the federal court. I find myself in the position as a lawyer that I don't know what to do. These two gentlemen are at odds with each other as a result of everything last night. I can't in my estimation —

The Court: You said you didn't know. I interrupt you, sir, to say that I have been listening to you carefully and you said you did not know who three individuals were that accosted one of your clients.

Mr. Powers: I don't know. I wasn't there.

The Court: Why does what you are telling me this morning then have anything to do with the reopening of this case? You requested a reopening.

Mr. Powers: My client Neil Gallagher informs me that during the course of this beating he was told not to say anything about ten credit cards that had come into evidence during the pendency of this matter.

The Court: The court will be in recess, Mr. Clerk. Will you recess, please, Mr. Marshal?"

(At this point in the proceedings, the defendant Neil Gallagher collapsed).

In chambers, the government attorney advised the court that a nurse who examined Neil Gallagher thought that he should be seen by a doctor and that

an ambulance was called. According to the nurse, Neil Gallagher's temperature and blood pressure were normal and there was a smell of alcohol on his breath. Neil Gallagher said he had a history of kidney problems.

The case was continued until Monday morning, September 15, 1969 (A. 26-27).

On Monday, September 15, 1969, both defendants were in court. Attorney Powers advised the court that he withdrew the motion made on behalf of Neil Gallagher to reopen the trial to permit him to take the stand. (A. 28).

Neil Gallagher was acquitted on all 7 substantive counts, but was found guilty of the conspiracy count only. (A. 7). Thomas Gallagher was found guilty on all 8 counts. (A. 6).

Both defendants were immediately sentenced to 5 years and fined $1,000 on each of the counts of which he was found guilty (A. 7). Thomas' sentences ran concurrently.[2]

Without the benefit of a pre-sentence investigation, (A. 7), the trial court denied bail on appeal (A. 7). Upon application to the appellate court, bail was granted pending appeal to this petitioner only, and he yet remains enlarged on bail.

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[2] Thomas Gallagher withdrew his appeal and is presently serving his sentence.

Reasons for Granting the Writ.

1.

Petitioner's Sixth Amendment right to have counsel dedicated to his interests in presenting his defense was violated. When defense counsel clearly demonstrated the impossible position he found himself in defending both petitioner and his co-defendant, the trial court should have severed petitioner's case.

The Sixth Amendment guarantees to the defendant in a criminal proceeding the right to be represented and heard by counsel of his own choosing and dedicated to his own interest. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938). A conflict of interests on the part of counsel representing two different defendants may be such as to deprive the accused of the effective assistance of counsel. *Glasser* v. *United States,* 315 U.S. 60, 70 (1942); *United States* v. *Hayman,* 342 U.S. 205, 208 (1952).

And it is immaterial whether such counsel was appointed by the court or selected by the accused, in the absence of facts constituting a waiver of the right. *Hayman* v. *United States,* 187 F. 2d 456, 460 (9th Cir. 1950); *Jones* v. *Huff,* 152 F. 2d 14 (D.C. Cir. 1945). Prejudice to a defendant from the failure to have the effective assistance of counsel results whether counsel is court appointed or selected by the accused. That right "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from this denial." *Glasser* v. *United States,* 315 U.S. 60, 70.

And although the right to assistance of counsel can be waived, the courts indulge every reasonable presumption

against waiver of such fundamental constitutional right and do not presume acquiescence in the loss of such a right. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

The decision of the Court of Appeals (App. A, 5 to 7)[3] has decided this question completely in conflict with the applicable and controlling decision by this court in *Glasser* v. *United States*, supra. Although *Glasser* was presented in the briefs and upon oral argument, the Court of Appeals nowhere touched upon this case—and indeed, cited not one case supportive of its opinion.

Additionally, the Court of Appeals has decided this case in conflict with decisions of other Court of Appeals on the same matter.

Ashe v. *McNamara*, 355 F. 2d 277 (1 Cir. 1965);
Morgan v. *United States*, 396 F. 2d 110 (2 Cir. 1968);
White v. *United States*, 396 F. 2d 822 (5 Cir. 1968);
Campbell v. *United States*, 352 F. 2d 359 (D.C. Cir. 1965);
Lollar v. *United States*, 376 F. 2d 243 (D.C. Cir. 1967);
Ford v. *United States*, 379 F. 2d 123 (D.C. Cir. 1967).

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[3] "App." refers to Appendix printed herein containing the opinion of the court below.

And, indeed, the decision is even in conflict with a previous decision of its own circuit.

United States v. *Gougis,* 374 F.2d 758 (7 Cir. 1967).

Petitioner Neil Gallagher was put in an impossible position when the same lawyer represented him as represented his brother Thomas. The history of the various counsels' appearances suggest this situation was not petitioner's choice.

At first Neil had no counsel. (A. 2). Then Thomas Gallagher's lawyer, attorney Philip Goodman, filed his appearance on behalf of Neil on April 25, 1969, "for arraignment only." (A. 3). Attorney Goodman had been trying to withdraw from the case ever since he filed his appearance on February 14, 1969. (A. 2). The court then appointed attorney Antonio Gassaway on May 9, 1969, as counsel for Neil. Mr. Gassaway attempted to withdraw from the case (A. 5), but that motion was denied. Finally, on June 25, 1969, attorney Harvey J. Powers filed his appearance as additional counsel for both defendants (A. 5); and eventually he was the lawyer for both when the trial commenced on September 8, 1969. Both attorneys Goodman and Gassaway were granted leave to withdraw on that date (A. 6).

Before the taking of any evidence, attorney Powers alerted the court to a possible conflict of interests between the defendants. After the chief government witness, Fred Foster, had testified, and before cross-examination began, Mr. Powers advised the court:

> ". . . I indicated to the court yesterday, that I thought perhaps during the hearing of the matter before your Honor and the jury, that there was a potential conflict of interests between my clients and my representing both of them, and now, I may have been a bit

> premature, but now, in my very humble judgment, your Honor, the events would seem to support my position as far as my having the evidence from the last two witnesses . . ." (A. 13).

About 99% of Foster's testimony related to Thomas and did not touch Neil Gallagher at all. (A. 9-12). Attorney Powers stated his dilemma in cross-examining Foster, thusly:

> "I find myself in, I think, an untenable position legally. The basis of what I am going to say now is a motion for mistrial . . . Now this is a conspiracy matter, your Honor. The evidence introduced by Mr. Todd on behalf of the government from Mr. Foster was considerably more—the weight of the evidence leaned considerably more to Thomas Gallagher than it did to Neil Gallagher . . . The only problem I find at this juncture, your Honor, is very simply this: As far as this witness is concerned, to which I am going to address myself at the moment before the jury, is the fact that I find myself in a hard position to cross-examine this witness as to both defendants. I don't know legally or morally whether I should let Tom Gallagher go at this time and concentrate on the lack of evidence against Neil Gallagher, or whether I should concentrate on the [evidence] against Neil and pound that in front of the jury." (A. 13).

This conflict between the defendants caused some sort of an explosion at the end of the government's case. The government concluded its evidence on Thursday, September 11, 1969, and when motions for acquittals were denied, attorney Powers announced that both defendants rested their case without presenting any evidence. (A. 25).

But on the next morning, September 12, 1969, Mr. Powers advised the court that Neil Gallagher wanted the case to be reopened because he wanted to take the witness stand and testify. (A. 26). Mr. Powers further advised the

court that Thomas Gallagher did *not* want the case reopened. He wanted it kept closed. (A. 26). The lawyer confessed to not knowing what to do, because "these two gentlemen are at odds with each other as the result of everything last night." (A. 27).

The reference to "last night" was to the fact that Neil complained he had been beaten up by three unknown men. (A. 26).

Then Neil collapsed in court and was taken away in an ambulance. (A. 27).

When trial was resumed on Monday, September 15, 1969, Mr. Powers withdrew his motion on behalf of Neil to reopen the case. (A. 28).

We vouchsafe to say that no other case has ever presented so obvious a situation of conflict of interests as in the case at bar. It was impossible that Neil could have been defended properly by the same attorney who defended his brother, Thomas.

We point out that in *Glasser, supra,* both defendants were former assistant United States attorneys who were familiar with the criminal law and the demonstrated conflict between them nowhere reached the proportions here demonstrated.

And, as in the case at bar, the defense attorney in *Craig* v. *United States,* 217 F. 2d 355 (6 Cir., 1954) also faced the dilemma of cross-examining a witness in order to weaken the effect of direct testimony against one defendant, while possibly eliciting damaging testimony against the other. The Sixth Circuit remanded for a new trial.

In the case at bar, the Court of Appeals stated, "We perceive nothing in this record which demonstrates the existence of any real conflict of interests between the defen-

dants. And counsel had ample opportunity to make such a showing if such conflict existed." (App. A. 7). First, we do not know how a conflict of interests can be more amply demonstrated. But if more explication was needed, the procedure adopted by the Fourth Circuit Court of Appeals in *Kelly* v. *Peyton,* 420 F.2d 912 (1969) should have been followed. The cause was remanded for a hearing to determine defendant's waiver of the conflict of interests.

If petitioner had counsel other than the one who represented his brother Thomas,[4] there would be no difficulty to resolve in petitioner's desiring to take the stand and testify, possibly to exonerate himself.

If the Sixth Amendment right to effective assistance of counsel is to have any viability, it should be exercised under the circumstances here outlined.

Conclusion

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

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[4] ". . . the dominant member of the conspiracy [who] played a more prominent role in carrying out the illegal activities involved." (Op. App. 7).

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970—SEPTEMBER SESSION, 1970

No. 17937

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NEIL GALLAGHER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 11, 1971

Before CASTLE, *Senior Circuit Judge,* and CUMMINGS and STEVENS, *Circuit Judges.*

CASTLE, *Senior Circuit Judge.* The defendant-appellant, Neil Gallagher, was convicted of conspiracy[1] to violate 18 U.S.C.A. §1343. The conspiracy offense was charged in Count VIII, the last count, of an indictment naming the defendant-appellant and his brother, Thomas Gallag-

[1] A violation of 18 U.S.C.A. §371.

her, as defendants. The first seven counts of the indictment charged both of the defendants with substantive offenses—the use of interstate telephone communication on seven specific occasions in furtherance of a scheme to defraud—in violation of 18 U.S.C.A. §1343.[2] The case was tried to a jury which found the defendant, Thomas Gallagher, guilty on all of the counts of the indictment; acquitted appellant, Neil Gallagher, on the seven substantive counts, but found him guilty on the conspiracy count. The appellant, Neil Gallagher, was sentenced to five years imprisonment and fined $1000.[3]

Neil Gallagher, in his appeal, predicates the existence of error requiring a reversal on (1) insufficiency of the evidence to sustain his conviction of the conspiracy charged; (2) the District Court's denial of his motion for a mistrial, and its failure to order a severance; and (3) improper restriction of cross-examination.

The scheme to defraud, as described in the indictment, involved the use of stolen, spurious or fraudulently em-

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[2] §1343 provides: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1000 or imprisoned not more than five years, or both."

[3] Defendant Thomas Gallagher was sentenced to five years imprisonment on each count, the sentences to run concurrently, and fined $1000 on each count, the fines to be cumulative. The defendants filed a joint notice of appeal, but Thomas Gallagher filed a motion in this Court, prior to oral argument herein, to withdraw his appeal. That motion was allowed on August 10, 1970 by a three-judge panel of this Court.

bossed American Express Company credit cards by the defendants for the purchase of airline tickets which were then sold at a substantial discount under a false representation that defendants could obtain such tickets at a discount of approximately fifty percent.

The record discloses that there is direct evidence in the form of testimony of Fred Foster, a government witness, of Thomas Gallagher's use of interstate telephone communication on the dates specified in the indictment in connection with the sale of airline tickets at a substantial discount to Foster. Other evidence establishes beyond question that these tickets were obtained through the use of a stolen or otherwise misappropriated American Express Company credit card and thereafter delivered to Foster who turned them over to an airline investigator. Foster also testified that in answer to an inquiry he made concerning Neil Gallagher, Thomas Gallagher told the witness that Neil was his brother and was in charge of Thomas' New York operation. And Lois Seaver, who is named as an unindicted co-conspirator in Count VIII of the indictment, testified that she was employed by Thomas Gallagher to take various credit cards along with signed vouchers to pick up tickets at the "will call" desks of airline offices and then deliver the tickets to Thomas Gallagher. This witness stated that on one occasion when she so presented an American Express Company credit card and was advised by the airline employee that the card had been altered, and that it would be necessary to call New York to check on the card, she excused herself on the pretext of using the washroom while the call was being made, left the building, and reported to Thomas Gallagher that she had lost the credit card.

The appellant points to the fact that he was acquitted on the substantive counts relating to the interstate tele-

phone communications with Foster, and argues that there is a total absence of any relevant or legal evidence which serves to connect him with his brother, Thomas Gallagher, in engaging in any of the substantive acts—the interstate telephone calls made in furtherance of the alleged scheme to defraud—and, consequently, the evidence is insufficient to sustain his conviction for conspiracy. In support of this argument the appellant urges that the testimony above summarized, in so far as it contains any reference to him, constituted inadmissible hearsay as to him under the rule that declarations of one conspirator in furtherance of the objects of the conspiracy made to a third party are admissible against an alleged co-conspirator only if there is proof, independent of such declaration, that the alleged co-conspirator is connected with the conspiracy.

The flaw in appellant's argument which makes it inapposite is that here the record discloses that there is independent evidence of appellant's connection with the conspiracy which serves to make the declarations of his brother Thomas to Foster admissible against appellant. In this connection Jack Seaver, the husband of Lois Seaver, testified that in a conversation he had with Neil and Thomas Gallagher, Neil berated Lois Seaver for having lost a credit card that Neil could have sold in New York. Neil added: "I am going to New York, I could have got rid of that card". In addition, Bert Poppeliers, who at the time to which he made reference was employed as controller at a Chicago hotel, testified that on two occasions he had conversations with the appellant in which the appellant stated he was going to New York to deliver a package of ten credit cards which he had received from Thomas Gallagher, that when he delivered these American Express Company credit cards he would

collect the money to be paid for them, and that he would be reimbursed a certain amount. In the second conversation, which occurred about a week after the first, appellant stated that he had not yet made the New York trip to deliver the credit cards; he further stated that he used American Express Company credit cards to obtain tickets at the airport in New York in the same manner in which tickets were obtained by Thomas Gallagher in Chicago. The conversation took place in the hotel's cocktail lounge where the witness and the appellant were having drinks.

We conclude, on this phase of the appeal, that considering the evidence in the light most favorable to the government (*Glasser* v. *United States,* 315 U.S. 60, 80) the verdict of the jury is substantially supported by the record.

At the trial both defendants were represented by the same counsel. He entered the case as retained counsel some two and one-half months before the trial. Prior thereto the appellant had been represented by separate court-appointed counesl who had been appointed before appellant's arraignment. Before the cross-examination of the government's second witness, Fred Foster, trial counsel for the defendants made an oral motion for a mistrial. The basis for this motion was that counsel's appraisal of the evidence which had been adduced up to that point, viewing it in the light of the court's rulings with respect to what evidence, at that stage, was to be considered against only one of the defendants and what was to be considered against both, was that the evidence bore more heavily against Thomas Gallagher than against the appellant and presented counsel with a question as to the manner in which he should cross-examine Foster. That he didn't know, "whether I should let Tom Gallagher

go at this time and concentrate on the lack of evidence against Neil Gallagher or whether I should concentrate on the [evidence] against Neil and pound that in front of the jury". After the trial judge commented that the customary manner of presenting the evidence in a conspiracy case was being followed, counsel for defendants added that the evidence seemed to support his surmise that there was a potential conflict in interest between his clients. The District Court denied the motion for mistrial, inquired if counsel desired to make any other motion, and was advised that counsel had none to make at that time.

After the government concluded its case, and motions for acquittals were denied, the defendants rested their case without presenting evidence. On the next morning counsel for defendants advised the court that appellant wanted the case to be reopened so that he could take the stand and testify, but that defendant Thomas Gallagher opposed any reopening of the case. Before any ruling was made by the court, appellant collapsed and by agreement of the parties the trial was continued to the following Monday morning. When the trial resumed the appellant withdrew his motion that the case be reopened to permit him to testify.

Appellant contends that he was denied his Sixth Amendment right to effective assistance of counsel because a conflict of interest existed between the defendants which precluded their representation by the same counsel, and that, consequently, the District Court's failure to grant the motion for a mistrial and order a severance constituted reversible error.[4] We disagree. The mere fact that the

[4] Although no express motion or request for a severance was made, it would seem that if a conflict of interest between defendants required the declaration of a mistrial a severance also would have been required.

evidence against appellant's co-defendant, Thomas Gallagher, is stronger than that against the appellant does not indicate, much less demonstrate, the existence of a conflict of interest between the defendants. On the record before us, it indicates only that Thomas Gallagher apparently was the dominant member of the conspiracy and played a more prominent role in carrying out the illegal activities involved. That a difference in the weight of the evidence against co-defendants may cause trial counsel to speculate as to the trial strategy he should employ in the cross-examination of a witness, likewise, does not of itself serve to establish that counsel is unable to effectively represent both defendants. Nor does the fact that one of the co-defendants expressed a desire to testify, which he promptly withdrew at the first opportunity. The existence of a conflict of interest, to warrant the result here sought, must be founded on something more than mere speculation or surmise. We perceive nothing in this record which demonstrates the existence of any real conflict of interest between the defendants. And counsel had ample opportunity to make such a showing if such conflict existed.

The appellant's complaint that he was unduly restricted in cross-examination is based solely on the court's ruling sustaining a government objection to one question trial counsel for the defendants asked of witness Poppeliers. The witness on direct examination had testified with respect to a conversation, mentioned earlier in this opinion, between the witness and the appellant, Neil Gallagher, which Poppeliers stated took place in the cocktail lounge of the hotel where he was then employed. In such conversation, as related by the witness on direct examination, appellant had stated that he was going to New York to deliver ten American Express Company credit cards for

Thomas Gallagher, and that he used such credit cards to obtain airline tickets in New York in the same manner as Thomas Gallagher did in Chicago. With reference to the occasion of this conversation, the witness was asked on cross-examination if on the basis of his business experience and "expertise" would he say that Neil Gallagher was intoxicated. The government objected and was sustained. The appellant contends that the jury had a right to know the answer to the question in order to judge whether the content of the conversation was "straight talk from Neil—or drunken puffing". But apart from consideration of the relevance of the question, the District Court was correct in its ruling. The form in which the question was put sought to elicit an opinion of the witness based on his assumed "expertise". But, whether another person was intoxicated at a particular time or place is a subject upon which the ordinary witness may testify—the opinion of such a witness is admissible. 32 C.J.S. Evidence §546(27); Jones on Evidence, 5th Ed. §405 (Vol. 2, p. 757, fnt. 4). This being so, expert opinion is not ordinarily admissible—the subject being one within the knowledge of all men of common education and experience. Special skill or "expertise" does not entitle a witness to give an expert opinion if the subject is one where the opinion of an ordinary observer is admissible or where the jury is capable of forming its own conclusions from facts which are susceptible of proof in common form. 32 C.J.S. Evidence §546(62); Jones on Evidence, 5th Ed. §403. The expert opinion here sought to be elicited from the witness was clearly inadmissible. There was no attempt by trial counsel to rephrase the question or pursue the line of questioning in a proper manner. Appellant's con-

tention that he was unduly restricted in his cross-examination is wholly without merit.

The judgment order of conviction and sentence from which appellant appeals is affirmed.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeal for the Seventh Circuit

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Tuesday, March 16, 1971

Before

Hon. LATHAM CASTLE, *Senior Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

No. 17937

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

NEIL GALLAGHER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1567

NEIL GALLAGHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 437 F. 2d 1191.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1971. A petition for rehearing was denied on March 16, 1971. On April 9, 1971 the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, prejudicial error arose from retained counsel's joint representation of petitioner and his co-defendant at trial.

424-639—71

STATEMENT

After a jury trial with his brother Thomas Gallagher in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to use interstate telephone communications in furtherance of a scheme to defraud, in violation of 18 U.S.C. 371.[1] He was sentenced to five years' imprisonment and a $1,000 fine. The court of appeals affirmed (Pet. App. A).

1. The evidence showed that between July and December 1967 Thomas Gallagher used stolen or altered American Express credit cards to obtain domestic airline tickets for flights originating in Chicago (App. 9, 17, 22, 25).[2] Thomas' method was to telephone the order to an airline serving Chicago and then use Mrs. Lois Seaver, an unindicted co-conspirator (Pet. App. A 3), to present to the airline clerk the bogus credit card together with a voucher signed in the name of the credit card holder. Thomas paid her for her work (App. 15–17) and thereafter sold the airline tickets at a fifty percent discount (App. 9–10). Using this method, Thomas, after several interstate telephone calls had been made, obtained airline tickets for the use of one Foster, a government informant residing in Fort Wayne, Indiana (App. 9–11, 14, 22).

During one telephone conversation with Thomas, Foster was told that petitioner was Thomas' brother

[1] Thomas Gallagher was convicted of the conspiracy and of seven substantive offenses (18 U.S.C. 371, 1343). His appeal was withdrawn (Pet. 7).

[2] "App." refers to the court of appeals appendix on file with the Clerk of this Court.

and that petitioner handled Thomas' New York operations (App. 11–12). Mrs. Seaver's husband testified that on one occasion he heard petitioner complain of Mrs. Seaver's loss of a credit card. Petitioner said that he "could have got rid of" the card in New York (App. 24). In addition, one Poppelier., to whom Thomas had described his airline ticket procurement operation, testified that petitioner told Poppeliers that he operated similarly in New York City, that he obtained the credit cards from Thomas, and that he would soon proceed there with ten American Express credit cards. Petitioner stated that the cards would be disposed of profitably and that Thomas, as a result, would be able to pay his hotel bill (App. 17–20).

tioner. His brother Thomas also had separate ap-

2. In May 1969, the court appointed counsel for petipointed counsel. On June 25, 1969, Harvey Powers filed an appearance as additional counsel for both Thomas and petitioner. When trial commenced on September 8, 1969, the separate counsel were permitted to withdraw and Mr. Powers undertook the joint representation of Thomas and petitioner (Pet. 4, App. 3–5).

After the second government witness, Foster, had finished testifying on direct, Mr. Powers made a motion for a mistrial based on an asserted conflict of interest in the joint representation, since Foster's testimony had been more inculpatory of Thomas than of petitioner. Mr. Powers claimed that this placed him in a "hard position" as to whether the cross-examination of Foster should be focused on showing the lack

of evidence against petitioner, to Thomas' detriment (Pet. 4, App. 13). The court denied the motion (App. 13), and counsel then proceeded with the cross-examination of Foster and thereafter cross-examined other government witnesses.

After the government and the defense rested, an overnight adjournment was taken. The following morning, petitioner indicated to Mr. Powers that during the adjournment he had been beaten by unknown assailants who had sought to intimidate him and that he wished to reopen his case and testify. Thomas, according to Mr. Powers, objected to such reopening. Mr. Powers indicated that he did not know what to do. Before the court ruled, petitioner collapsed. An attending nurse found his temperature and blood pressure normal but detected the smell of alcohol on his breath. Petitioner claimed to have a history of kidney problems and was removed by ambulance (App. 26–27). A doctor was appointed to examine him (App. 6). After a weekend adjournment, petitioner withdrew his request for reopening, and the case then proceeded without further incident to verdict (App. 28).

ARGUMENT

Petitioner contends that there was a conflict of interest between his brother and himself and that Mr. Powers' motion for a mistrial should have been granted (Pet. 8–12). He does not specify the particulars of any prejudice, beyond the vague allegations that counsel did not know whether to stress to the jury the facts which were especially relevant to the guilt or innocence of one brother or the other. Neither

brother, at trial, made an effort to implicate the other, and petitioner even now makes no claim that he was prevented from testifying if he had so desired. Counsel cross-examined the government's witnesses on behalf of each defendant (*e.g.*, App. 16–17, 20, 22, 25). It is well settled that joint representation is not forbidden and that a mistrial or severance should be granted only when it is shown that a genuine conflict of interest exists among the jointly represented defendants which will result in prejudice. *E.g., Glasser* v. *United States,* 315 U.S. 60; *United States* v. *Sheiner,* 410 F. 2d 337, 342 (C.A. 2), certiorari denied, 396 U.S. 825; *United States* v. *Rubin,* 433 F. 2d 442 (C.A. 5); *United States* v. *Williams,* 429 F. 2d 158, 161 (C.A. 8); *Duran* v. *United States,* 413 F. 2d 596, 599 (C.A. 9); *Fryar* v. *United States,* 404 F. 2d 1071, 1073 (C.A. 10), certiorari denied, 395 U.S. 964. As the court below held (Pet. App. A. 5–7), no such conflict was shown here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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